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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

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6 UNITED STATES OF AMERICA,

Case No. 3:17-cr-00082-MMD-CLB

7 Plaintiff,

ORDER

8 v.

9 ANTOINE HARRIS,

10 Defendant.  
11

12 **I. SUMMARY**

13 Defendant Antoine Harris is serving a 137-month sentence, followed by two five-  
14 year terms of supervised release, at the Federal Correctional Institution at Victorville  
15 Medium I ("FCI Victorville") for one count of possession with intent to distribute 5 grams  
16 or more of methamphetamine and one count of possession of a firearm in furtherance of  
17 a drug trafficking crime. (ECF No. 152 at 1-3.) Before the Court is Harris' motion for  
18 compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) based on the "extraordinary  
19 and compelling reasons" presented by the COVID-19 pandemic as applied to his health  
20 and particular circumstances.<sup>1</sup> (ECF No. 153 (the "Motion").) When the Court imposed  
21 his sentence nine months ago, it was fully apprised of Harris' health conditions as well as  
22 the risk of COVID-19 exposure to immunocompromised persons. And Harris has not  
23 presented evidence in his Motion that he is now at a greater risk of contracting a severe  
24 case of COVID-19 than he was when the Court sentenced him. Additionally, Harris chose

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26 <sup>1</sup>The government opposes his release. (ECF No. 155.) The government also filed  
27 an unredacted set of Harris' medical records along with a motion to seal concurrently with  
28 its response. (ECF Nos. 156, 157.) The Court finds that Harris' medical records should  
remain under seal as they contain confidential information about Harris, including Harris'  
health information and information about his medications. The Court will therefore grant  
the government's motion to seal. (ECF No. 156.)

1 to decline full COVID-19 immunization, a choice that does not constitute an “extraordinary  
2 and compelling reason” for his release. Therefore, and as further explained below, the  
3 Court will deny Harris’ Motion.

## 4 **II. BACKGROUND**

5 Harris pled guilty to one count of possession with intent to distribute 5 grams or  
6 more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(B)(viii) and  
7 one count of possession of a firearm in furtherance of a drug trafficking crime in violation  
8 of 18 U.S.C. § 921(c)(1)(A)(i). (ECF No. 152 at 1.) More specifically, Harris admitted he  
9 knowingly possessed 5 grams or more of actual methamphetamine with the intent to  
10 distribute it to other people. (ECF No. 131 at 7.) In addition, Harris “possessed a High  
11 Point .380 caliber pistol bearing serial number P1973672 in furtherance of his possession  
12 of the methamphetamine[.]” (*Id.*) On September 14, 2020, the Court sentenced him to  
13 137 months in prison, followed by two five-year terms of supervised release to be served  
14 concurrently. (ECF No. 152 at 2-3.) At the time he filed his Motion, Harris had served 43  
15 months of his 137-month sentence, or about a third. (ECF No. 155 at 3.)

16 As noted, Harris seeks release because his preexisting medical conditions make  
17 him particularly vulnerable to COVID-19. (ECF No. 153 at 1.) Harris is a 45-year-old Black  
18 male with multiple sclerosis (“MS”).<sup>2</sup> (*Id.*) Further, the medication he takes to treat his MS  
19 reduces the immune response triggered by live vaccinations. (ECF No. 155 at 6-7.) Harris  
20 received one dose of the Moderna COVID-19 vaccine, which is not a live vaccine, on  
21 March 10, 2021. (*Id.* at 6.) He refused the second dose due to becoming ill after the first  
22 shot. (*Id.*) He also tested positive for COVID-19 in October 2020. (ECF No. 153 at 2.)

## 23 **III. LEGAL STANDARD**

24 Harris specifically seeks release under the compassionate release provision of 18  
25 U.S.C. § 3582(c)(1)(A)(i), as amended by the First Step Act (“FSA”) of 2018. (ECF No.  
26 153 at 1.) This provision offers Harris a limited exception to the general rule that the Court  
27 may not modify or reduce the length of a sentence after the Court has imposed it. See 18

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28 <sup>2</sup>These conditions existed at the time of sentencing. (ECF No. 145 at 5.)

1 U.S.C. § 3582(c); *see also* *U.S. v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003) (explaining  
2 that generally a court cannot modify a sentence after it has imposed it). “It allows the  
3 sentencing judge to reduce a sentence based on ‘extraordinary and compelling reasons’  
4 after the defendant has asked the [Bureau of Prisons (“BOP”)] to bring such a motion on  
5 her behalf and exhausted all administrative rights to appeal the BOP’s denial of that  
6 request.” *U.S. v. Mogavero*, Case No. 2:15-cr-74-JAD-NJK, 2020 WL 1853754, at \*2 (D.  
7 Nev. Apr. 13, 2020) (citing 18 U.S.C. § 3582(c)(1)(A)(i)).<sup>3</sup> Moreover, before granting such  
8 a request, the Court “must consider the factors in 18 U.S.C. § 3553(a) ‘to the extent that  
9 they are applicable,’ and any sentence reduction must be ‘consistent with applicable  
10 policy statements issued by the Sentencing Commission.’” *Id.* (citations omitted).

#### 11 **IV. DISCUSSION**

12 The Court follows a three-step process to evaluate the Motion. First, the Court  
13 determines if Harris has satisfied the statutory prerequisites under Section 3582(c)(1)(A).  
14 Then, the Court evaluates whether Harris has shown “extraordinary and compelling  
15 reasons” for the Court to release him under Section 3582(c)(1)(A)(i). Finally, the Court  
16 addresses the applicable policy statements and sentencing factors under Section  
17 3582(c)(1)(A). Here, as there is no dispute regarding the first step, the Court will primarily  
18 address the latter two steps. Ultimately, the Court does not find extraordinary and  
19 compelling reasons exist to grant Harris’ Motion.

##### 20 **A. Statutory Prerequisites**

21 Section 3582(c)(1)(A) requires that a defendant ask the BOP to bring a motion for  
22 compassionate release on the defendant’s behalf before filing such a motion with a court,  
23 normally done by submitting a request to the warden. *See* 18 U.S.C. § 3582(c)(1)(A). In  
24 addition, a defendant may only bring a motion under Section 3582(c)(1)(A) “after the  
25 defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of  
26 Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the

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27 <sup>3</sup>The Court reads § 3582(c) as granting the Court broad authority to modify and  
28 reduce a sentence upon a showing of ‘extraordinary and compelling reasons.’ *See* 18  
U.S.C. § 3582(c).

1 receipt of such a request by the warden of the defendant's facility, whichever is earlier[.]”  
2 *Id.*

3 Harris represents he has satisfied the statutory prerequisites because he  
4 submitted a request for compassionate release to the warden on October 29, 2020, and  
5 more than 30 days later, the warden has not responded. (ECF No. 153 at 6.) The  
6 government does not dispute that Harris has satisfied the statutory prerequisites. The  
7 Court accordingly finds it has jurisdiction over Harris' request, and will move on to the  
8 other two steps of the analysis.

### 9 **B. Extraordinary and Compelling Reasons**

10 To prevail on the “extraordinary and compelling reasons” prong of the analysis,  
11 Harris must establish: (1) the combination of his age and underlying health conditions  
12 elevates his risk of becoming seriously ill were he to contract COVID-19 (the “Underlying  
13 Health Conditions Prong”); and (2) he faces greater risk from COVID-19 if he continues  
14 to be housed at his current facility instead of being released (the “Location Prong”). See,  
15 e.g., *U.S. v. Kauwe*, 467 F. Supp. 3d 940, 942-43 (D. Nev. June 3, 2020).

#### 16 **i. Underlying Health Conditions Prong**

17 The parties agree that Harris' MS places him at a higher risk of COVID-19  
18 complications. (ECF Nos. 153, 155.) Harris instead argues that his MS makes him more  
19 likely to develop severe complications if he is re-infected with COVID-19, despite having  
20 received one dose of the Moderna vaccine. (ECF No. 153 at 2-3, 10-11.) The government  
21 counters that Harris chose not to receive the second dose of the Moderna vaccine, and  
22 thus does not show “extraordinary and compelling reasons” for release. (ECF No. 155 at  
23 4, 6.) The Court agrees with the government.

24 Although Harris may be medically justified in refusing his second Moderna COVID-  
25 19 vaccination, he ultimately did choose to decline full immunization. Harris reported  
26 becoming “violently sick” for three days after receiving the first shot. (ECF No. 153 at 3.)  
27 But the Court cannot say this is atypical—the side effects of the Moderna vaccine include  
28 fever, nausea, and vomiting. (ECF No. 155 at 8.) In addition, when he received his vaccine

1 shot, Harris was concurrently taking Gilenya for his MS. (*Id.* at 6.) And, indeed, Gilenya’s  
2 drug warnings advise: “Avoid the use of live attenuated vaccines during and for 2 months  
3 after treatment with GILENYA because of the risk of infection.” Novartis, *Highlights of*  
4 *Prescribing Information* (last accessed June 3, 2021),  
5 <https://www.novartis.us/sites/www.novartis.us/files/gilenya.pdf>. But the Moderna vaccine  
6 is an mRNA vaccine; it “do[es] not use the live virus that causes COVID-19.” CDC,  
7 *Understanding mRNA COVID-19 Vaccines*, [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mRNA.html)  
8 [ncov/vaccines/different-vaccines/mRNA.html](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mRNA.html) (last accessed June 2, 2021). Thus, Harris’  
9 concerns about receiving the second COVID-19 shot are not necessarily justified. That  
10 said, Gilenya’s warnings do not mention mRNA vaccines—a relatively new technology—  
11 which, contrary to the government’s assertion, does not mean Gilenya will not have a  
12 negative interaction with a mRNA COVID-19 vaccine. (ECF No. 155 at 7.) Given the  
13 emergent nature of mRNA vaccines, this Court does not assume that mRNA vaccines  
14 are safe to receive while taking Gilenya. In sum, it was not entirely unreasonable for Harris  
15 to refuse the second Moderna shot.

16       However, the refusal does cut against Harris’ reinfection argument. If Harris’  
17 primary concern is with COVID-19 complications, he had the opportunity (and may still)  
18 to avail himself of the full protection of the Moderna vaccine. Additionally, one shot of the  
19 Moderna vaccine still likely confers some amount of immunity to Harris. He is now  
20 presumably more protected from COVID-19 than he was at sentencing in September  
21 2020, prior to vaccine availability. Further, the administration of the vaccine to staff and  
22 inmates at FCI Victorville since sentencing has logically reduced the overall COVID-19  
23 exposure level to Harris. Therefore, since Harris likely has more immunity to COVID-19  
24 than at sentencing, and because he voluntarily declined full immunization, the Court does  
25 not find “extraordinary and compelling reasons” for his release.

26       Moreover, given that Harris already contracted COVID-19 in October 2020, his  
27 concerns regarding severe complications upon reinfection are unpersuasive. While his  
28 MS likely puts Harris at higher risk than a healthy person should he become reinfected

1 with COVID-19—especially since he is not fully vaccinated—he did not report becoming  
2 severely ill from COVID-19 when he contracted it in October 2020. (ECF Nos. 153 at 2,  
3 155 at 6.) Since that date, Harris has received one dose of the Moderna vaccine, further  
4 increasing his protection from severe illness. Finally, as discussed below, the number of  
5 currently reported COVID-19 cases at FCI Victorville is negligible. Therefore, even if the  
6 Court were to assume that Harris has satisfied the “Underlying Health Conditions Prong,”  
7 he has not established the “Location Prong” of the “extraordinary and compelling reasons”  
8 analysis.

## 9 **ii. Location Prong**

10 The Location Prong requires that Harris face greater risk from COVID-19 if he  
11 continues to be housed at his current facility instead of being released. *See Kauwe*, 467  
12 F. Supp. 3d at 943. Currently, the BOP reports no active cases of COVID-19 at FCI  
13 Victorville. See Bureau of Prisons, *COVID-19 Coronavirus*,  
14 <https://www.bop.gov/coronavirus/> (by scrolling to COVID-19 cases, then clicking ‘Full  
15 breakdown and additional details...’, and then scrolling to Victorville Medium I). Even if  
16 the Court assumes some underreporting from the BOP, the data tends to indicate that  
17 there is not currently an active outbreak at the facility, and Harris has not offered any  
18 contrary evidence. As of June 4, 2021, the BOP reports that 398 staff and 1887 inmates  
19 have been fully vaccinated at the Victorville Federal Correctional Complex, which is  
20 comprised of three facilities including FCI Victorville. See Bureau of Prisons, *COVID-19*  
21 *Coronavirus*, <https://www.bop.gov/coronavirus/> (by scrolling to COVID-19 Vaccine  
22 Implementation, then clicking ‘Learn more about vaccinations and view individual facility  
23 stats’, and then scrolling to Victorville FCC). Based on these figures, the Court calculates  
24 roughly 50% of inmates at Victorville FCC have been fully vaccinated. This is a  
25 comparable rate to the 52.3% of American adults who have been fully vaccinated as of  
26 June 4, 2021. See CDC, *COVID-19 Vaccinations in the United States*,  
27 <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last accessed June 4, 2021). The  
28 Court thus finds that Harris has not established that he faces greater risk within the facility

1 than without. Therefore, the balance of the “extraordinary and compelling reasons”  
2 analysis does not weigh in Harris’ favor.

### 3 **C. Section 3553(a) Factors**

4 The Court must next consider the factors set forth in Section 3553(a) to the extent  
5 they are applicable. These factors include: (1) the nature and circumstances of the  
6 offense and the history and characteristics of the defendant; (2) the need for the sentence  
7 imposed; (3) the kinds of sentences available; (4) the kinds of sentence and the  
8 sentencing range established in the Sentencing Guidelines; (5) any pertinent policy  
9 statement issued by the Sentencing Commission;<sup>4</sup> (6) the need to avoid unwarranted  
10 sentence disparities among defendants with similar records who have been found guilty  
11 of similar conduct; and (7) the need to provide restitution to any victims. See 18 U.S.C. §  
12 3553(a)(1)-(7). As to the Section 3553(a)(2) factors, the need for a sentence must be  
13 sufficient, but not greater than necessary, to serve the purpose of “just punishment,  
14 deterrence, protection of the public, and rehabilitation.” *Dean v. United States*, 137 S. Ct.  
15 1170, 1175 (2017) (citation and internal quotation marks omitted).

16 Harris does not address the Section 3553(a) factors in his Motion at length. He  
17 simply asserts that his MS diagnosis in 2018 has changed his views on life and if released,  
18 he would not pose a danger to the public. (ECF No. 153 at 4.) The government counters  
19 that the Section 3553(a) factors weigh against granting the Motion because the Court  
20 evaluated the same factors at sentencing nine months ago, with no significant changes  
21 in circumstances since then. (ECF No. 155 at 14.) The Court again agrees with the  
22 government.

23 The Court examined the Section 3553(a) factors in September of 2020 when the  
24 COVID-19 pandemic was in full swing. The Court incorporates by reference its discussion  
25 of the sentencing factors from the sentencing hearing. (ECF No. 151.) That discussion

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26 <sup>4</sup>Because the Sentencing Commission never released guidelines with respect to  
27 compassionate release under the FSA, Section 3553(a)(5)’s pertinent policy statement  
28 factor is neutral. See *U.S. v. Regas*, Case No. 3:91-cr-57-MMD-NA-1, 2020 WL 2926457,  
at \*4 n.7 (D. Nev. June 3, 2020) (citation omitted).

1 continues to apply to Harris' circumstances today. Indeed, the most significant change in  
2 circumstances since the Court sentenced Harris weighs against granting Harris' Motion—  
3 the availability and administration of an effective COVID-19 vaccine. Harris has received  
4 one dose of the vaccine, and many inmates and staff are fully vaccinated at this point.  
5 These facts point towards lower susceptibility to serious COVID-19 complications for  
6 Harris than he faced at sentencing. And the Court finds no other change in circumstances  
7 relevant to the Section 3553(a) factors since that date. Therefore, the sentencing factors  
8 do not weigh in favor of Harris' release.

9 **V. CONCLUSION**

10 The Court notes that the parties made several arguments and cited to several  
11 cases not discussed above. The Court has reviewed these arguments and cases and  
12 determines that they do not warrant discussion as they do not affect the outcome of the  
13 Motion before the Court.

14 It is therefore ordered that Harris' motion for compassionate release (ECF No. 153)  
15 is denied.

16 It is further ordered that the government's motion to seal (ECF No. 156) is granted.

17 DATED THIS 8<sup>TH</sup> Day of June 2021.

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20 MIRANDA M. DU  
21 CHIEF UNITED STATES DISTRICT JUDGE  
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